U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 22, 2004

The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Conyers:

This responds to your letters of August 25, November 25, and December 23, 2003, regarding the Department's handling of redistricting submissions from the States of Mississippi and Texas pursuant to Section 5 of the Voting Rights Act of 1965. We apologize for our delay in responding to your letters.

The Civil Rights Division followed its usual and long-standing procedures in reviewing these submissions on a non-partisan and non-political basis. Although your November 25 letter expressed concern about the Department's request for additional information in the Mississippi matter, such a request is a common and accepted procedure in the review of Section 5 submissions. *See* 28 C.F.R. § 51.37. Indeed, the Supreme Court unanimously held that not only was this request for additional information from Mississippi within the Attorney General's discretion, but "[t]he request was neither frivolous nor unwarranted." *Branch v. Smith*, 123 S.Ct. 1429, 1436 (2003).

Turning to Texas, we understand that you disagree with the Department's failure to object to the Texas Senate's decision not to place a so-called "blocker bill," which would require a two-thirds super-majority vote, as a prerequisite to taking up congressional redistricting legislation. This procedural change, however, required no approval from the Department. As the Voting Section explained in an August 26, 2003, letter to the Texas Secretary of State, pre-clearance of this procedural move was unnecessary because the decision in question was an internal legislative parliamentary rule or practice -- not a change affecting voting within the meaning of the Voting Rights Act -- and fell outside the scope of Section 5. A three-judge panel of the United States District Court for the Southern District of Texas came to the same conclusion on September 12, 2003. A copy of the court's decision is attached for your convenience.

As for the Texas congressional redistricting submission, we can assure you that the Department's review of the State's plan was based on an extremely thorough evaluation of the relevant facts and governing legal standards. While your letter of December 23 interpreted the fact that the determination letter was not signed by the Chief of the Voting Section as "a clear signal of [the career staff's] objection to the nature of the [review] process," this view is unfounded. It has been the longstanding practice of the Civil Rights Division -- regardless of administration -- to have all pre-clearance or objection letters on state-wide redistricting plans to be signed by the Assistant Attorney General or the individual designated to act in his place. The process followed in the review of the Texas plan and the letter of determination sent to Texas was entirely consistent with this practice.

Finally, the recommendation memoranda prepared by the staff of the Civil Rights Division's Voting Section in the congressional redistricting submissions for seven states, including Texas, are internal, deliberative documents that are not generally disclosed outside of the Department. We appreciate your interest in this matter, but believe that the confidentiality of these types of documents is important to ensuring the candid, unfettered exchange of views that is essential to our professional judgements about these and other law enforcement matters. Our disclosure of such documents would present an unacceptable risk of chilling attorneys participating in that important process.

We hope that this information is helpful. Please do not hesitate to contact the Department if you would like additional assistance in any other matter.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosures

cc: The Honorable F. James Sensenbrenner, Jr.
Chairman

RAA:JDR:RAK:TFM:jdh:par
166-012-3
2003-2939

Voting Section - NWB.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

August 26, 2003

Geoffrey S. Connor, Esq.
Assistant Secretary of State
State of Texas
P.O. Box 12697
Austin, Texas 78711-2697

Dear Mr. Connor:

This letter refers to your recent correspondence in which you request clarification under the Procedures for the Administration of Section 5 (28 C.F.R. 51.35) of whether preclearance is required pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, before the Texas Lieutenant Governor may bring congressional redistricting legislation to the floor of the Senate during the Second or any subsequent Called Session, without having first introduced a so-called "blocker bill" that could be bypassed only by a two-thirds vote to suspend the Senate rules. Your letter takes the position that Section 5 preclearance is not required under these circumstances but asks that this Department treat your letter as a Section 5 submission if we determine that the practice in question requires Section 5 preclearance. We received your letter on August 15, 2003; supplemental information was received on August 22, 2003, and you have requested expedited administrative consideration pursuant to 28 C.F.R. 51.34.

Our analysis indicates that the practice in question is an internal legislative parliamentary rule or practice -- not a change affecting voting -- and, therefore, is not subject to the preclearance requirement of Section 5. See Presley v. Etowah County Commission, 502 U.S. 491, 502 (Section 5 does not cover the internal operating procedures of an elected body). Accordingly, no determination by the Attorney General is required or appropriate under Section 5. See 28 C.F.R. 51.2, 51.12, 51.13, and 51.35.

If and when a new redistricting plan is actually adopted by the Texas Legislature, signed into law by the Governor, and submitted to the Attorney General for Section 5 review, the Attorney General will review the entire proposed plan and the process by which it has been adopted to ensure that the submitted changes have neither a discriminatory purpose nor a discriminatory effect. See Georgia v. United States, 411 U.S. 426 (1973); see also 28 C.F.R. 51.52.

Sincerely,

Joseph D. Rich
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20035*

December 19, 2003

Honorable Geoffrey S. Connor
Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Secretary Connor:

I am writing in reference to your recent submission pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, of (i) Texas House Bill 1, which provides for the extension of the filing period for congressional candidates, changes in the primary election dates, procedures for canvassing, and the allowance of late counting of ballots; and (ii) Texas House Bill 3, which provides the 2003 Congressional Redistricting Plan enacted by the Texas Legislature. We received your initial submission on October 21, 2003, and received supplemental information at various times through December 11, 2003.

The Attorney General does not interpose any objection to the specified changes in House Bill 1 or House Bill 3. We do note, however, that Section 5 provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. 51.41 and 51.43.

Because the Section 5 status of these changes is of interest to the court in *Session v. Perry*, Civil Docket No. 2:03-CV-354 (E.D. Texas, Marshall Division), we also are providing a copy of this letter to the court.

Sincerely,

Sheldon T. Bradshaw
Principal Deputy Assistant Attorney General

cc: Honorable Patrick E. Higginbotham
Honorable T. John Ward
Honorable Lee H. Rosenthal

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

GONZALO BARRIENTOS, ET AL.,	*	
	*	
Plaintiffs,	*	
	*	
VS.	*	CIVIL ACTION NO. L-03-113
	*	
STATE OF TEXAS, ET AL.,	*	
	*	
Defendants.	*	

MEMORANDUM AND ORDER

This action was brought by eleven Texas State Senators against the State of Texas, its Governor, and Lieutenant Governor, seeking declaratory and injunctive relief under §§2 and 5 of the Voting Rights Act ("the Act"). The complaint primarily attacks two events: first, the decision by the state legislature to consider congressional redistricting legislation this year, notwithstanding that a redistricting plan has already been implemented this decade; second, the declaration by the Lieutenant Governor that redistricting legislation would be considered in a special session without adhering to the so-called "2/3rd Rule." Plaintiffs allege that these two events constitute changes affecting voting within the meaning of the Act and, therefore, are legally unenforceable because preclearance has not been obtained. Defendants have filed a motion to dismiss, arguing that the Act does not apply to either of the challenged events. We agree.

The United States Supreme Court decision in Presley v. Etowah

33

County Commission, et at., 112 S.Ct. 820 (1992), controls this case. Presley makes clear that, while the reach of the Act is broad, it is nevertheless still "an extraordinary departure from the traditional course of relations between the States and the Federal Government," id. at 827, and that its reach is limited to procedures that have "a direct relation to voting and the election process." id. at 829. Thus, the Act is concerned with changes affecting procedures for casting ballots, candidacy requirements and qualifications, and composition of the electorate. Id. at 828. Presley distinguished between changes directly affecting voting by the electorate and "changes in the routine organization and functioning of government." Id. at 829. While the latter may indirectly affect voting, they are not within the scope of the Act.

We readily acknowledge, as did the the Supreme Court, that "in a real sense every decision taken by government implicates voting," which is "but the felicitous consequence of democracy, in which power derives from the people." Presley, 112 S.Ct. at 829. Nevertheless, the Supreme Court insisted that a line must be drawn between events which directly affect the voters and events which, as here, affect the distribution of power between legislators of two different political parties. In the instant case, what will directly affect the voters of this State is a redistricting bill, not the mere consideration of such a bill or the process by which it comes to the floor of the Texas Senate. The Department of

Justice has also concluded that the consideration by the Texas legislature of a redistricting bill without applying the "2/3rd Rule" is not a change affecting voting within the contemplation of the Act. This conclusion, while not binding upon us, is entitled to "considerable deference." Id. at 831.

It is undisputed that any new redistricting bill would have a direct relation to voting. Accordingly, it would have to be precleared under the Act and would thereafter be subject to judicial challenge. However, that time has not yet come.

The motion to dismiss claims under the Voting Rights Act is GRANTED. We also DISMISS claims under 42 U.S.C. §1983, insofar as Plaintiffs claim that the State's decision to consider redistricting legislation and the failure to adhere to the "2/3rd Rule" violate the First, Fourteenth and Fifteenth Amendments to the United States Constitution.

We have promptly issued this brief opinion because of our understanding that another special session of the Texas legislature is imminent. We reserve the opportunity to issue a more detailed opinion hereafter, if appropriate. We also withhold ruling on Plaintiffs' motion to file a first amended complaint. The purpose of the amendment is to add a Count V, complaining of threats to arrest the Plaintiffs and also to require that they pay a monetary sanction for their failure to appear at earlier special sessions. As discussed at the hearing on September 11, 2003, the arrest issue

likely will become moot. Indeed, the Plaintiffs' fear of being coerced to appear at a legislative session is shifting to a fear of being prevented from appearing. For reasons discussed at the hearing, neither the facts nor the law on the issue of threatened monetary sanctions are sufficiently developed at this point to permit an informed decision. Moreover, it is possible that future developments could also moot this issue.

DONE this 12th day of September, 2003.

U. S. CIRCUIT JUDGE PATRICK E. HIGGINBOTHAM

CHIEF U. S. DISTRICT JUDGE GEORGE P. KAZEN

U. S. DISTRICT JUDGE LEE H. ROSENTHAL